BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

CITY OF SNOQUALMIE, Petitioner, v. KING COUNTY, Respondent.	**CASE No. 14-3-0001** ***(Snoqualmie III)*** **ORDER OF DISMISSAL**

This matter comes before the Board on King County's motion to dismiss on the basis of res judicata. The question before the Board is whether prior adjudication precludes Petitioner's further challenge to the County's enactment of Ordinance 17687. The Board has before it the following:

- King County's Motion to Dismiss, filed March 11, 2014;
- City of Snoqualmie's Response in Opposition to Motion to Dismiss (City's Response), filed March 25, 2014;
- King County's Reply in Support of its Motion to Dismiss, filed April 1, 2014.

Pursuant to WAC 242-03-630(6) the Board takes notice of the following from *City of Snoqualmie v. King County (Snoqualmie II)*, GMHB Case No. 13-3-0002:

- *Snoqualmie II,* Petition for Review (February 11, 2013);
- *Snoqualmie II,* Prehearing Order (March 15, 2013);
- *Snoqualmie II*, Final Decision and Order (August 12, 2013);
- *Snoqualmie II,* Order Finding Compliance (January 30, 2014).

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, WA 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

I. PROCEDURAL BACKGROUND

On February 11, 2013, the City of Snoqualmie filed a petition for review challenging King County's adoption of Ordinances 17485, 17486, and 17487 updating its countywide planning policies, updating its comprehensive plan, and making minor adjustments to its UGA boundaries. The case was assigned Case No. 13-3-0002 and is referred to as *Snoqualmie II.* Following thorough briefing and argument, the Board entered a Final Decision and Order, August 12, 2013, finding the City failed to meet its burden to prove noncompliance with one exception. As to the updated Comprehensive Plan (Ordinance 17485) the Board remanded it to the County for review and/or amendment. The County subsequently adopted Ordinance 17687 (the Compliance Ordinance, published November 21, 2013) and submitted it to the Board for review to determine compliance. Snoqualmie filed timely objections to compliance. Before the Board heard and decided the compliance proceeding, the City of Snoqualmie filed a new PFR challenging the Compliance Ordinance.[1] The new case was assigned Case No. 14-3-0001 and is referred to as *Snoqualmie III.*

On January 30, 2014, the Board entered an Order Finding Compliance in *Snoqualmie II*. In the compliance order the Board ruled that King County's adoption of the Compliance Ordinance brought it fully into compliance with the GMA with respect to the matters raised in the *Snoqualmie II* petition for review and the case was closed.[2]

The Board now addresses the City's new challenge to the Compliance Ordinance – *Snoqualmie III*. King County has moved for dismissal based on res judicata. The City counters that its new petition accords with the Board's rules in WAC 242-03-940, that it asserts new and different claims, and that it was required in order to exhaust administrative remedies.

[1] The 60-day deadline for appealing the Compliance Ordinance was January 21, 2014. RCW 36.70A.290(2).
[2] Snoqualmie has appealed the *Snoqualmie II* FDO and Compliance Order. The matter is being heard in Thurston County Superior Court, Cause No. 14-2-00410-6.

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Olympia, WA 98504-0953
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II. BOARD DISCUSSION AND ANALYSIS

- **Authority of the GMHB to Apply Equitable Doctrines**

At the outset, the Board notes the Central Puget Sound Growth Management Hearings Board has long and consistently ruled that the growth boards are creatures of statute lacking equitable powers and therefore may not impose remedies such as res judicata and collateral estoppel.[3] However, in appeal of a Western Washington GMHB decision in a long-running Jefferson County dispute, Division II of the Washington State Court of Appeals concluded: "We hold that the growth boards have implied authority to apply res judicata and collateral estoppel." *Irondale Community Action Neighbors (ICAN) v. W. Wash. Growth Mgmt. Hearings Bd.*, 163 Wn. App. 513, 528, 262 P.3d 81 (2011). The *ICAN* Court reasoned that under RCW 36.70A.270(4) the growth boards "shall perform all the powers and duties specified in [the GMA] or as otherwise provided by law." Thus, authority to apply res judicata is implied "because the power to dismiss successive petitions raising the same claims and issues, or claims that could have been raised in a prior action, is necessary for expeditious and efficient disposition of GMA petitions." *Id*.

Accordingly, the Central Puget Sound panel of the GMHB repudiates its prior rule.

- **Applying the *ICAN* Court's Analysis**

Res judicata and collateral estoppel are legal doctrines under which a tribunal may dismiss a petition seeking to relitigate claims previously adjudicated or which could have been raised in a prior proceeding. Our Supreme Court stated the requirements in *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd*., 164 Wn.2d 768, 791-92, 193 P.3d 1077 (2008):

> Under the doctrine of res judicata, or claim preclusion, "a prior judgment will bar litigation of a subsequent claim if the prior judgment has a concurrence of identity with [the] subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made."

[3] *City of Tacoma v. Pierce County,* CPSGMHB Case No. 94-3-0001, Order on Dispositive Motions (Mar. 4, 1994), at 3-11; *Peninsula Neighborhood Association v. Pierce County*, CPSGMHB Case No. 95-3-0071, Order Denying Pierce County's Motion to Dismiss (Jan. 9, 1996), at 2-3; *Corinne Hensley v Snohomish County (Hensley VII)*, CPSGMHB Case No. 03-3-0010, Order on Motions (Aug. 11, 2003), at 6-7.

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> Collateral estoppel, or issue preclusion, requires "(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied."

The *ICAN* case involved a UGA dispute and a litigation sequence similar to the one here. ICAN challenged Jefferson County's 2003 Ordinance designating a UGA in the Hadlock/Irondale area. The Western Board found the County out of compliance and remanded for correction. After proceedings encompassing subsequent County ordinances, ICAN challenges which were consolidated, and Board compliance orders, the Board in 2009 found the County in compliance on all issues and closed the case. Before the Board issued its 2009 compliance order, ICAN filed a new petition for review challenging the County's final compliance ordinance and raising ten alleged GMA violations.

The Western Board compared the issues addressed in the 2009 Compliance Order with those raised in the new petition and found all were raised and decided, or could have been raised, in the prior proceedings. The Western Board ruled that ICAN's new petition was barred by res judicata, and the Court affirmed. While the Snoqualmie matter is much more straightforward, it presents the same question of whether a new petition challenging a compliance ordinance may be barred by res judicata after entry of a final compliance order.

Final Judgment on the Merits. A threshold requirement of either res judicata or collateral estoppel is a final judgment on the merits in the prior adjudication. *ICAN*, 163 Wn. App. 513, 523. In *Snoqualmie II* the Board issued a final decision and order, finding one area of noncompliance, followed by a compliance order, finding compliance and closing the case. There has been a final judgment on the merits in the GMHB *Snoqualmie II* adjudication.

Identity of Persons or Parties and Quality of Parties. The persons or parties and their respective positions are identical in *Snoqualmie II* and *Snoqualmie III*. In each case the City

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of Snoqualmie is the challenger with the burden of proof under GMA. In each case King County is the respondent whose adopted ordinances are presumed valid but are subject to challenge for GMA compliance.[4]

Identity of Subject Matter. The subject matter of *Snoqualmie III* is identical to that of the prior appeal. The Petitions for Review read as follows:

- *Snoqualmie II* – "the overarching issue relates to the refusal or failure of King County to address legislative amendments to the Growth Management Act adopted by SHB 1825 in 2009." PFR, p. 2
- *Snoqualmie III* – "the overarching issue presented by this case involves King County's continuing refusal to comply with the Legislature's 2009 adoption of SHB 1825." PFR, p. 2.

The King County ordinances challenged in *Snoqualmie II* updated and revised the Countywide Planning Policies and the Comprehensive Plan in a suite of three ordinances. One of these ordinances was revised and re-adopted as the Compliance Ordinance, which made additional revisions to the Comprehensive Plan to address the SHB 1825 legislative provisions. The issue presented on compliance was whether King County's amended comprehensive plan met the requirements of SHB 1825, both by taking the legislative amendments into consideration and by making any revisions necessitated. *Snoqualmie III* narrows the challenge to just the updated Comprehensive Plan as adopted in the Compliance Ordinance, but the subject matter is again King County's alleged failure to comply with the SHB 1825 GMA provisions in its updated Comprehensive Plan.[5] The Board finds identity of subject matter between the two petitions.

Identity of Claims or Issues. Snoqualmie asserts that the legal issues raised In *Snoqualmie III* differ from those previously asserted in *Snoqualmie II*. With respect to King County's comprehensive plan, the *Snoqualmie II* petition asserted violation of RCW

[4] The facts in *City of Arlington,* 164 Wn.2d at 792, present a situation where the County's different role and burden on the issues in two consecutive cases demonstrated lack of identity in "the quality of the persons for or against whom a claim is made."
[5] The legislative record for the Compliance Ordinance is identical in any case.

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36.70A.210 (concerning countywide planning policies),[6] RCW 36.70A.110(2) (UGA expansion criteria) and RCW 36.70A.020(1) (Goal 1 – Urban growth). Further, the City points out the FDO remanded the Comprehensive Plan update to the County to bring it into compliance with RCW 36.70A.130 and asserts the only issue in the compliance proceeding was RCW 36.70A.130(1).

Snoqualmie III alleges the Compliance Order violates GMA Goal 1 – urban growth, but also GMA Goal 5 – economic development. Non-compliance with both RCW 36.70A.110 and RCW 36.70A.115 is asserted.

The Board notes first the *ICAN* court's comment:

> ICAN points out that it framed its claims differently in the new petition and argues that it raised sections and subsections of the GMA that could not have been raised in the [prior proceeding.] This showing is inadequate. Merely asserting a new legal basis for a claim that has already been decided does not bar the application of res judicata.[7]

In the present matter, the Board finds no merit in the City's assertion that raising different GMA subsections necessarily creates a new claim or issue. First as to GMA planning goals, the Board seldom finds a GMA violation based on a Planning Goal viewed in isolation from a statutory requirement.[8] The *Snoqualmie III* petition links Goal 5 Economic Development to RCW 37.70A.110(2) as amended by SHB 1825, an issue that was thoroughly briefed and argued in *Snoqualmie II*. Thus citation to GMA Goal 5 does not provide a new claim.

Second, the City states that its prior petition did not assert a violation of RCW 36.70A.115 and that this is a new claim. The City's argument is without merit. In *Snoqualmie II*, the City asserted, inter alia, that King County violated GMA provisions concerning UGA expansion by ignoring the 2009 legislative amendments referred to as SHB 1825. SHB 1825 enacted parallel amendments to the UGA expansion criteria in RCW

[6] The Board found compliance as to the alleged RCW 36.70A.210(1) violation. FDO, pp. 25-27.
[7] 163 Wn. App. at 529 (citations omitted).
[8] *North Clover Creek v. Pierce County*, Case No. 10-3-0015, FDO (May 18, 2011) p. 10.

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36.70A.110(2) and RCW 36.70A.115.[9] The *Snoqualmie II* FDO reflects that the parties' arguments and the Board's consideration of the UGA criteria encompassed both these parallel amendments, acknowledging that they must be read coherently.[10] The Board found King County's amendments to its Countywide Planning Policies appropriately incorporated the SHB provisions, reading RCW 36.70A.110(2) and RCW 36.70A.115 together, but the County's Comprehensive Plan update (Ordinance 17485) contained no indication SHB 1825 had been considered.

On remand, the County adopted Ordinance 17687 which included findings concerning review of the plan in light of SHB 1825 with specific reference to RCW 36.70A. 115. At the Compliance Hearing, the interplay of RCW 36.70A.110(2) and RCW 36.70A.115 was again reviewed.[11] In briefing and argument in the compliance proceedings, the burden was on the City to identify specifically how the Comprehensive Plan as revised in the Compliance Ordinance failed to comply with the SHB 1825 requirements. The City raised a number of objections, which were argued vigorously. The Board concluded as to the Compliance Ordinance: "<u>These revisions bring the County's 2012 CP update into compliance with the SHB legislative amendments to RCW 36.70A.110(2) and .115.</u>"[12] In sum, Snoqualmie's citation to RCW 36.70A.115 in its *Snoqualmie III* issue statement does not create a new claim.

<u>Fairness to the Parties.</u> Finally, the City suggests it could not have argued its RCW 36.70A.115 issue in the Compliance Hearing because the only issue on compliance was the procedural question of whether the County had "reviewed and revised" its plan pursuant to RCW 36.70A.130(1). Snoqualmie asserts it was required to file a new petition under WAC 242-03-940, the GMHB rules governing the compliance hearing:

> (5) Issues not within the nature, scope, and statutory basis of the conclusions of noncompliance in the prior order will not be addressed in the compliance hearing but require the filing of a new petition for review.

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[9] SHB 1825 also amended RCW 36.70A.210(3)(g). This provision was also germane to the Board's analysis of the 2009 legislative amendment. FDO, p. 41.
[10] FDO, pp. 29-43.
[11] Order Finding Compliance (Jan. 30, 2014), at 8-10.
[12] *Id*. at 10 (emphasis added).

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Similarly, the City asserts if its *Snoqualmie II* appeal succeeds in the courts, the fruits of its victory might be denied on an argument of mootness if the County's subsequent action goes unchallenged.

The Board has already noted the extent to which the new petition reiterates issues "within the nature, scope, and statutory basis" of the *Snoqualmie II* orders. Nevertheless, the Board recognizes that here, as in the *ICAN* case, the 60-day statutory deadline for a new petition challenging the Compliance Ordinance expired well before the Board's statutory deadline for issuing its compliance order. Diligent council may have no choice but to file a new petition or risk a charge of failure to exhaust administrative remedies.[13] The Board's order of dismissal is an indication that GMHB remedies have indeed been exhausted.

Conclusion. The Board finds and concludes that the petition for review in this matter is barred by the doctrines of res judicata and collateral estoppel. The petition must be dismissed.

III. ORDER

Based on review of the Petition for Review, King County's motion to dismiss and the arguments and authorities in the briefs of the parties, the Petition for Review and Board orders in the prior adjudication, and having deliberated on the matter, the Board ORDERS:

- King County's Motion to Dismiss is **granted.**
- *City of Snoqualmie v. King County (Snoqualmie III)*, Case No. 14-3-0001, is **dismissed** and the case is **closed**.

[13] In this case the Board notes the additional complication of the retirement of the long-time city attorney just before the Compliance Hearing and appearance of new council for the city as the 60-day petition deadline approached.

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SO ORDERED this 25th day of April, 2014.

_____
Margaret Pageler, Board Member

_____
Cheryl Pflug, Board Member

_____
Charles Mosher, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[14]

[14] Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.
A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970.
It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

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